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No. 90-1856

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JUDICIAL RETIREMENT & REMOVAL COMMISSION OF KENTUCKY - - - Petitioner

versus

DAN JACK COMBS, JUSTICE OF THE SUPREME COURT OF KENTUCKY - Respondent

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REPLY TO MEMORANDUM IN OPPOSITION

GEORGE F. RABE
Counsel of Record
1004 First National Building
Main & Upper Streets
Lexington, Kentucky 40507-1708
(606) 255-2313

JAMES D. LAWSON
Executive Secretary
Judicial Retirement and Removal Commission
P.O. Box 21868
Lexington, Kentucky 40522-1868
(606) 269-1476

Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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REPLY TO MEMORANDUM IN OPPOSITION

Purpose of this Brief

This reply brief is filed pursuant to Rule 15.6 of the rules of this Court to address the argument first raised in the memorandum in opposition that the decision below rests on adequate and independent state grounds.

The Kentucky Decision Is Based On the First Amendment to the United States Constitution; It Is Clear from the Opinion That the Case Does Not Rest Upon Adeqate and Independent State Grounds.

The guaranty of free speech under the First Amendment to the United States Constitution was the dominant

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*On the basis of information from the Clerk of this Court, we are using the true names of the parties in the caption as the matter is no longer confidential.

issue throughout Kentucky proceedings. Petition, p. 7. The Commission's first conclusions of law were on the constitutional issue. The Commission stated it does not have the authority to rule on the constitutionality of the rules but went further and stated, Petition Appendix, 17a, 18a:

> However, it should be noted that all but one member of the Commission would reject Justice Comb's constitutional arguments and find that the Code of Judicial Conduct, on its face and as applied to the facts in this case, is constitutional.

At the beginning of its legal analysis, the Kentucky Supreme Court stated, Petition Appendix 3a:

> *Based upon the controlling case law* and for the reasons cited herein, the Court hereby holds that the Findings and Order of the Commission relating to Counts, I, III, IV, V, VI, and VII, are clearly erroneous, and further, are in contravention of state and federal law.
>
> *The United States Constitution guarantees the right of an individual to free speech.* Accordingly, Congress can make no law abridging the freedom of speech. First Amendment, U.S. Constitution. *Similarly,* Section Eight of the Kentucky Constitution provides that "(e)very person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty." (Emphasis added.)

The "controlling case law" upon which the court below based its decision consisted of seven decisions of this Court, a decision of the United States Court of Appeals for the Fifth Circuit, and a decision of the United States District Court for the Northern District of Florida, all dealing with the right of free speech under the United States

Constitution. Petition Appendix 4a, 6a, 7a, 9a. Not a single Kentucky case was cited in the opinion of the court below, and in fact, no decision of any court was cited in the court's opinion except for the nine federal free speech cases.

There is no suggestion that the court below considered the Kentucky guaranty of free speech to be any broader than the federal guaranty discussed in the nine cases cited by the court as "controlling case law." The court also referred to the Kentucky constitutional provision for selection of judges by nonpartisan popular election, Petition Appendix 7a, but it is clear from the context that the reference was merely a basis for application of the First Amendment guaranty of free speech.

The court below stated that "The focus of the allegations against Justice Combs centers on Canon 7 (B)(1) of the Code." Petition Appendix 5a. It noted in part regarding Justice Combs' contention that, Petition Appendix 6a:

> Justice Combs asserts that to restrict his political speech from *all* "disputed legal or political issues" unconstitutionality deprives him of free speech without a compelling state interest. (Emphasis the court's.)

The court ruled, Id.:

> However, SCR 4.300 Canon 7(B)(1)(c) is not so narowly drawn as to limit a candidate's speech to such specific prohibitions. Instead, the section prohibits *all* discussion of a judicial candidate's views on disputed legal or political issues, and thus unnecessarily violates fundamental state and federal constitutional free speech rights of judicial candidates. (Emphasis the court's.)

It also stated, Petition Appendix 7a, 8a:

> Moreover, we are not persuaded by the Commission's argument that the language of Canon 7(B)(1)(c) prohibiting all discussion of "disputed legal issues" by judicial candidates is necessary to prevent campaign statements which may indicate a predisposition or bias in favor of one litigant over another.

Following these conclusions, the court below said it found no evidence to suport the Commission's finding that the campaign advertisements reached the level of making a pledge of preferential treatment to one class of persons over another and did not find that Justice Combs' statement amounted to pledges or promises of conduct in office. Petition Appendix 8 a. In rejecting the Commission's determination that Justice Combs' campaign conduct violated three other canons, Canons 1 and 2 and 7 (B)(1)(a), the court stated, Petition Appendix 9a:

> *The basis* for these Findings *again centers on speech* which falls within constitutional protections. We can find no evidence that violations of these Canons occurred, *especially when viewed in the context of Justice Combs, right to free speech.* (Emphasis added.)

All of the statements of Justic Combs involved in this case were stipulated to have been made. There was no factual issue. The issue was essentially whether those statements could be punished under the Canons of the Code of Judicial Conduct consistently with the First Amendment's guaranty of the right of free speech.

This Court addressed the subject of adequate and independent state gounds at length in *Michigan* v. *Long,* 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983). The following points of discussion from that case are directly relevant here.

Quoting from another case, 463 U.S. at 1039:

"[e]ven if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires is to reach the merits."

* * *

[O]utright dismissal of cases is clearly not a panacea because it cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the *independence* of an alleged state ground is not apparent from the four corners of the opinion. We have long recognized that dismissal is inappropriate "where there is strong indication . . . that the federal constitution as judicially construed controlled the decision below." 463 U.S. at 1040. (Emphasis the Court's.)

* * *

[W]hen as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on

bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision. 463 U.S. at 1040, 1041.

* * *

Our requirement of a "plain statement" that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions. Rather, in determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, (citation omitted) we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law. 463 U.S. at 1042.

* * *

In these [two cited] cases, the state courts relied on both state and federal law. We determined that we had jurisdiction to decide the cases because our reading of the opinions led us to conclude that each court "felt compelled by what is understood to be federal constitutional considerations to construe and apply its own law in the manner it did." 463 U.S. at 1042, n.8.

* * *

Our review of the decision below under this framework leaves us unconvinced that it rests upon an independent state ground. Apart from its two citations of the State Constitution, the court below relied *exclusively* on its understanding of Terry and other federal cases. Not a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional. . . . The references to the State Constitution in no way indicate that the decision below rested on grounds in any

way *independent* from the state court's interpretation of federal law. Even if we accept that the Michigan Constitution has been interpreted to provide independent protection for certain rights also secured under the Fourt Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law. 463 U.S. at 1043.

CONCLUSION

The court below expressly decided this case on the basis of "controlling case law" consisting exclusively of federal cases on the right of free speech under the United States Constitution. The Petition should not be denied on the basis of adequate and independent state grounds.

Respectfully submitted,

GEORGE F. RABE
Counsel of Record
1004 First National Building
Main & Upper Streets
Lexington, Kentucky 40507-1708
(606) 255-2313

JAMES D. LAWSON
Executive Secretary
Judicial Retirement and Removal Commission
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